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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	7
Argument:	
A government contractor's liability for damages caused by its default is a "debt due" to the United States under the federal priority statutes even if it is unliquidated and uncertain in amount	9
A. The language and history of the priority statutes do not support limitation of the priority to claims for fixed amounts presently payable	9
1. The language and structure of the federal priority statutes	9
2. The history and purpose of the federal priority statutes	13
B. The principle the court of appeals announced permits a debtor to circumvent the federal priority and give preferential treatment to private creditors	16
C. This court has construed the priority statutes as not being limited to claims enforceable in a common law action for debt or to claims that have fully matured or are liquidated	19
D. Liabilities uncertain in amount or partly contingent are generally treated as "debts" in bankruptcy and other proceedings involving debtors	25
Conclusion	27

574-633—75——1

CITATIONS

Cases:

	Page
Beaston v. *Farmers' Bank*, 12 Pet. 102	19
Bramwell v. *United States Fid. & Guar. Co.*, 269 U.S. 483	19
Brashear v. *West*, 7 Pet. 608	10
Brown v. *O'Keefe*, 300 U.S. 598	26
Central Trust Co. v. *Chicago Auditorium Ass'n*, 240 U.S. 581	26, 27
Chestnut St. Trust & Sav. Fund Co.'s Assigned Estate, in re, 217 Pa. 151, 66 A. 332	25
City of Bridgeport v. *Aetna Indem. Co.*, 91 Conn. 197, 99 A. 566	25
Davis v. *Michigan Trust Co.*, 2 F. 2d 194, affirmed *sub nom. Mellon* v. *Michigan Trust Co.*, 271 U.S. 236	22–23
Dunham v. *Waterman*, 17 N.Y. 9	10
Employers' Liab. Assur. Corp. v. *Astoria Mahogany Co.*, 6 F. 2d 945	22
Grover v. *Wakeman*, 11 Wend. 187	10
Haijek & Simecek v. *Luck*, 96 Tex. 517, 74 S.W. 305	4
Halsey v. *Whitney*, 4 Mason 206	10
Freeman, in re, 35 F. 2d 952	4
J. M. Radford Grocery Co. v. *Ewing*, 66 S.W. 2d 344	4
Johnson v. *Robinson*, 68 Tex. 399, 4 S.W. 625	4
Jones v. *Cooper*, 2 Aikens 54, 16 Am. Dec. 678	25
King v. *United States*, 322 F. 2d 317, affirmed, 379 U.S. 329	6, 13, 22
Lewis v. *United States*, 92 U.S. 618	21
Lothrop v. *Reed*, 95 Mass. (13 Allen) 294	25
Marshall v. *New York*, 254 U.S. 380	14
Massachusetts v. *United States*, 333 U.S. 611	24
Maynard v. *Elliott*, 283 U.S. 273	26
Miller v. *Robertson*, 266 U.S. 243	19
Murray v. *Ridley*, 3 Harr. & McH. 171	13–14
Price v. *United States*, 269 U.S. 492	7, 19, 20
Reed v. *McIntyre*, 98 U.S. 507	10
Small Business Administration v. *McClellan*, 364 U.S. 446	6
United States v. *Barnes*, 31 F. 705	6, 16, 23
United States v. *Brunner*, 282 F. 2d 535	23, 26, 27

Cases—Continued

	Page
United States v. *Bryan*, 9 Cranch 374	21
United States v. *Butterworth-Judson Corp.*, 269 U.S. 504	22
United States v. *Fisher*, 2 Cranch 358	20
United States v. *Flint Lumber Co.*, 87 Ark. 80, 112 S.W. 217	23
United States v. *Key*, 397 U.S. 322	14
United States v. *Munsey Trust Co.*, 332 U.S. 234	15
United States v. *National Sur. Co.*, 254 U.S. 73	22
United States v. *State Bank*, 6 Pet. 29	6, 8, 13, 14, 15, 21, 22
Vetterlein, In re, 44 F. 57	23
Statutes and regulations:	
Act of July 31, 1789, 1 Stat. 29	9
Sec. 21, 1 Stat. 42	9
Act of March 3, 1797, Section 5, 1 Stat. 515, 31 U.S.C. 191 (Section 3466 of the Revised Statutes)	2, 5–6, 7, 9, 10, 13, 23, 24
Act of March 2, 1799, Section 65, 1 Stat. 676, as amended, 31 U.S.C. 192 (Section 3467 of the Revised Statutes)	2, 6, 7, 9, 11, 13, 20, 23
Bankruptcy Act, 30 Stat. 544, as amended, 11 U.S.C. 1 *et seq.*:	
11 U.S.C. 93(d)	6, 26
11 U.S.C. 95(a)	17
11 U.S.C. 95(b)	17
11 U.S.C. 103(a)(8)	6, 26
11 U.S.C. 103(a)(9)	26
11 U.S.C. 104(a)	13
11 U.S.C. 104(a)(5)	16
11 U.S.C. 110(a)(6)	26
11 U.S.C. 502	13
11 U.S.C. 506(1)	26
11 U.S.C. 506(6)	26
11 U.S.C. 707(2)	26
11 U.S.C. 806(2)	26
11 U.S.C. 806(7)	26
11 U.S.C. 1006(1)	26
11 U.S.C. 1006(4)	26
11 U.S.C. 1059(6)	13

Statutes and egulations—Continued	Page
1 Stat. 169, Section 45	10
1 Stat. 263	10
2 Stat. 36	10, 12
5 Stat. 444	12
14 Stat. 531	12
31 U.S.C. 227	14–15
Texas Code Ann., Bus. & Comm. §§ 23.01 *et seq* (1968)	4
32 C.F.R. 8.602–6(a)	16
32 C.F.R. 163.99	18
32 C.F.R. 163.101(b)	16
Miscellaneous:	
6 Annals of Cong. (1849)	13
8 Annals of Cong. (1851)	13
9 Annals of Cong. (1851)	13
Annotation, 51 A.L.R. 1355 (1927)	14
Bishop, *Insolvent Debtors* (3d ed. 1895)	10, 25
Burrill, *Voluntary Assignments* (2d ed. 1858)	10, 26, 27
1 Clark, *Receivers* (2d ed. 1929)	13, 25
1 Collier, *Bankruptcy* (Moore & King 14th ed. 1974)	12
3A Collier, *Bankruptcy* (Moore & King 14th ed. 1972)	12
Kyd, *Bills of Exchange* (3d ed. 1795)	20
4 Ops. Att'y. Gen'l. 380 (1845)	15
I Tardy, *Smith on Receivers* (2d ed. 1920)	26
II Tardy, *Smith on Receivers* (2d ed. 1920)	25
Tomlinson, *Administration of Decedents' Estates* (1972)	25
Woerner, *American Law of Administration* (1923)	25, 26

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 15–24) is reported at 497 F. 2d 976. The order of the district court (Pet. App. C 27–30) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B 25–26) was entered on July 26, 1974. By orders dated October 16 and November 18, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari until December 9, 1974. The petition was

filed on December 2, 1974, and was granted on February 18, 1975 (A. 70). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indebtedness to the United States arising from an insolvent government contractor's default occurring prior to its assignment for the benefit of creditors is disentitled to the statutory priority for "debts due to the United States" solely because the amount owing was not finally ascertained at the time of the assignment.

STATUTES INVOLVED

Section 5 of the Act of March 3, 1797, 1 Stat. 515, 31 U.S.C. 191 (Section 3466 of the Revised Statutes), provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 65 of the Act of March 2, 1799, 1 Stat. 676, as amended, 31 U.S.C. 192 (Section 3467 of the Revised Statutes), provides:

> Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

STATEMENT

The facts are undisputed and are summarized in the court of appeals' opinion (Pet. App. A 15–16).[1] In June 1966, respondent Emsco Screen and Pipe Company of Texas, Inc., entered into three government contracts. In one Emsco undertook to supply shield assemblies to the Navy for a contract price of $210,231 with deliveries to commence October 20, 1966, and to be completed by June 1967. In the second Emsco undertook to deliver curb deck assemblies to the Army by December 5, 1966, for a contract price of $27,428. In the third Emsco undertook to supply pallets to the Defense Supply Agency ("DSA") to be delivered by August 25, 1966, for a contract price of $72,637.

On August 5, 1966, Emsco gave notice that the Navy contract would be "impossible to perform" unless the Navy made progress payments not then called for

[1] The facts are set forth in detail in a stipulation of the parties (A. 32–42) and the opinion of the Armed Services Board of Contract Appeals (Nos. 11917, 12184), dated May 29, 1969, disposing of Emsco's claim concerning one of the contracts involved here (A. 43–67).

by the contract.[2] The Navy treated Emsco's letter as a repudiation and abandonment of the contract and formally terminated the contract on August 31, 1966. Emsco also repudiated the Army contract in August 1966 and did not deliver as required. The Army notified Emsco on August 21, 1966, that it intended to treat the contract as terminated. Finally, because Emsco had not delivered, DSA terminated its contract on October 19, 1966.

On October 20, 1966, Emsco made a voluntary assignment of its assets to respondent Thomas W. Moore, Jr., as assignee for the benefit of its creditors.[3] Emsco then had $55,707.28 in assets and, in addition to its debts to the United States involved in this case, owed nearly $6,000 to the City of Houston (see A. 41) and $68,759 to 61 private creditors (A. 68–69). Emsco stipulated that it had insufficient assets to satisfy all of its creditor obligations (A. 34), and, in

[2] A full statement of the difficulties involved with the progress payments and Emsco's failure to deliver under the Navy contract is found in the opinion of the Armed Services Board of Contract Appeals (A. 43–67).

[3] Texas, like most states, has a statutory procedure under which a debtor may obtain an adjustment of its liabilities by making an assignment for the benefit of creditors. Texas Code Ann., Bus. & Comm. §§ 23.01, *et seq.* (1968). In addition, Texas continues to recognize the validity of common law assignments for the benefit of creditors (see p. 10, *infra*, n. 7) in cases not covered by or not satisfying the requirements of the statutory provisions. See, *e.g.*, *Johnson* v. *Robinson*, 68 Tex. 399, 4 S.W. 625; *Haijek & Simecek* v. *Luck*, 96 Tex. 517, 74 S.W. 305; *J. M. Radford Grocery Co.* v. *Ewing*, 66 S.W. 2d 344, 345 (Tex. Ct. Civ. App.); *In re Freeman*, 35 F. 2d 952, 953 (C.A. 5). Emsco apparently made a common law assignment rather than an assignment pursuant to the Texas statute.

fact, the claims of the 61 private creditors—all of whom consented to the assignment—were themselves greater than Emsco's assets.

The United States did not consent to the assignment. Rather, it submitted to the assignee proofs of claims covering Emsco's debts to the United States for its defaults under the three contracts. The amount of Emsco's liability under the Navy contract was determined when the Navy, in November 1966, let a new contract at a higher price, resulting in excess costs of $40,607 (excluding interest), for which amount Emsco is admittedly indebted to the United States (A. 32). The Army formalized termination of its repudiated contract with Emsco on December 6, 1966, and let a new contract at a higher price in June 1967, with damages of $4,272 having accrued (A. 32–33, 37), although the government and the assignee subsequently agreed upon $5,000 as the amount of Emsco's debt to the United States under that contract (A. 33, 39). DSA also let a new contract at a higher price in January 1967, resulting in excess costs of $8,436, and DSA and the assignee have agreed on $6,073 (excluding interest) as the amount of Emsco's debt to the United States under that contract (A. 33).

The respondent assignee refused the government's request that he pay Emsco's debts to the United States arising out of Emsco's defaults on the three contracts (A. 22, 24, 26). Therefore, in February 1972 the United States filed suit in the United States District Court for the Southern District of Texas against the assignee and Emsco claiming priority under 31 U.S.C.

574-633—75——2

191 and 192 for the debts due to the United States under the Navy, Army, and DSA contracts, totalling $67,313.70 (not including interest). The district court held that the United States had priority for its three claims under 31 U.S.C. 191 and 192 (Pet. App. C 27–30).

The court of appeals reversed, one judge dissenting. Relying upon the technical requirements for a common law action for debt in the 1790's, the court held that because the claims "were not for fixed and certain amounts and presently payable" at the time of the voluntary assignment they were not entitled to the United States' priority under Sections 191 and 192 (Pet. App. A 17). Judge Coleman concurred in a separate opinion, on the ground that the United States was not entitled to priority on its claims because the amount of damages had been ascertained prior to the assignment by an authority having jurisdiction to bind both parties to the contract (*id.* at 19).

In his dissent, Judge Thornberry noted cases granting priority to the United States for claims wholly unliquidated at the critical date[4] and relied on the principle that Sections 191 and 192 are to be liberally construed to protect government funds (*id.* at 20, 22–23).[5] He also suggested that analogous definitions in the Bankruptcy Act for debts and unliquidated claims (11 U.S.C. 93(d) and 103(a)(8)) should apply in this context, and concluded that the majority's narrow construction of "debts" defeats the pur-

[4] *King* v. *United States*, 379 U.S. 329; *United States* v. *Barnes*, 31 F. 705 (C.C. S.D. N.Y.).

[5] *E.g.*, *Small Business Administration* v. *McClellan*, 364 U.S. 446, 451–452; *United States* v. *State Bank*, 6 Pet. 29, 35.

pose of protecting government revenues (*id.* at 22, 23–24). He would have held that a "debt due" under Sections 191 and 192 includes an obligation unliquidated at the time of insolvency "so long as the claim can be liquidated or estimated * * * within a reasonable time so as to avoid undue delay in distributing the debtor's assets to the creditors" (*id.* at 24).

SUMMARY OF ARGUMENT

The court of appeals held that the statutory priority accorded "debts due" to the United States applies only to "presently payable" debts "for fixed and certain amounts" such as might be recoverable in a common law action for debt (Pet. App. A 17), and hence is inapplicable to the government's claim for damages resulting from an insolvent debtor's breach of contract where the amount of the liability was not established until after the debtor made an assignment for the benefit of creditors. The court of appeals has given the priority statutes an unwarrantedly narrow construction contrary to their language, purpose and settled interpretation.

This Court has repeatedly held that the priority statutes are to be "liberally" construed in the government's favor and that the term "debts due" is not to be confined by any technical meaning. *E.g.*, *Price* v. *United States*, 269 U.S. 492, 500. More specifically, the Court has interpreted the statutes as applying without regard to whether the claim in issue was recoverable in an action for debt and even if the debt is not "presently payable" or certain in amount at the critical date.

The court of appeals erred in relying on antiquated pleading rules in construing the priority statutes, rather than considering the substantive principles developed concerning such related matters as bankruptcy and other proceedings involving debtors' estates. In those areas a claim based on a breach of contract would ordinarily be entitled to payment even if the debtor's liability was in some sense contingent or was uncertain in amount on the critical date. Respondents concede, for example, that the government's claims here would be provable debts entitled to share in the debtor's assets if there had been a bankruptcy proceeding (Reply to Pet. 8).

Implicit in the court of appeals' decision is a distinction among different types of debts due to the United States under which only some—those presently payable for which an action for debt might have been brought—are entitled to priority. But such a distinction among debts has no justification and was rejected by this Court nearly 150 years ago. See *United States* v. *State Bank*, 6 Pet. 29, 38. It would, moreover, provide a risky and unworkable standard for persons administering debtors' estates in determining whether payments to other creditors could safely be made, and might foster unnecessary litigation.

The court of appeals' interpretation of the priority statutes also has the undesirable consequence of providing a means for a debtor and its private creditors to circumvent the federal priority by resorting to a voluntary assignment for the benefit of creditors rather than bankruptcy proceedings in which the government's debt would be entitled to priority, leaving the government without recourse.

ARGUMENT

A GOVERNMENT CONTRACTOR'S LIABILITY FOR DAMAGES CAUSED BY ITS DEFAULT IS A "DEBT DUE" TO THE UNITED STATES UNDER THE FEDERAL PRIORITY STATUTES EVEN IF IT IS UNLIQUIDATED AND UNCERTAIN IN AMOUNT

A. THE LANGUAGE AND HISTORY OF THE PRIORITY STATUTES DO NOT SUPPORT LIMITATION OF THE PRIORITY TO CLAIMS FOR FIXED AMOUNTS PRESENTLY PAYABLE

The court of appeals' holding—that the federal priority statutes (Sections 3466 and 3467 of the Revised Statutes, 31 U.S.C. 191–192) are limited to claims of the United States that are "for fixed and certain amounts and presently payable" at the critical date and that could be recovered in a common law action for debt—is not supported by the language of the statutes, their purpose, or their history.

1. *The language and structure of the federal priority statutes*

The federal priority originated in the Act of July 31, 1789, 1 Stat. 29, which concerned debts to the United States based on importers' bonds posted in lieu of immediate payment of import duties. As in successor enactments, this statute provided that the "debt due to the United States" shall be satisfied first "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased * * *." Sec. 21, 1 Stat. 42. This provision was

reenacted *in haec verba* in 1970 (Sec. 45, 1 Stat. 169), and was broadened by a 1792 enactment specifying that "the cases of insolvency" referred to[6] should be deemed to extend "to cases in which a debtor, not having sufficient property to pay all his or her debts," makes a voluntary assignment for the benefit of creditors,[7] or in which the estate and effects of an absconding, concealed or absent debtor have been attached by process of law, or an act of legal bankruptcy has been committed.[8] 1 Stat. 263.

The broad scope of the present priority statutes derives from the Act of March 3, 1797, 1 Stat. 512, Section 5 of which provided that (1 Stat. 515):

[6] Although the 1792 statute referred to "the cases of insolvency" specified in the forty-fourth section of the 1790 statute, the only relevant mention of insolvency was in Section 45, which provided for the federal priority.

[7] An assignment for the benefit of creditors has been recognized as a debtor's remedy in this country since the eighteenth century. Cf. *Grover* v. *Wakeman*, 11 Wend. 187, 216 (N.Y. Ct. Corr. Err.) (Tracy, Sen., concurring); *Dunham* v. *Waterman*, 17 N.Y. 9, 15. Originally a matter of common law, such assignments eventually were supplemented or regulated by a variety of statutory provisions. See Burrill, *Voluntary Assignments* 10–28 (2d ed. 1858); Bishop, *Insolvent Debtors* 5–13, 116–117 (3d ed. 1895). See generally *Brashear* v. *West*, 7 Pet. 608, 614; *Reed* v. *McIntyre*, 98 U.S. 507, 509–511; *Halsey* v. *Whitney*, 4 Mason 206, 210 (C.C. Mass.) (Story, J.). In general, a common law assignment may provide that some or all of a debtor's assets be applied by the assignee to pay some or all creditors to the extent and in the order specified in the assignment. The assignment may also provide that payment thereunder will satisfy the debtor's obligations to creditors consenting to it. Burrill, *supra*, at 156–178, 583–588.

[8] A federal bankruptcy law was not enacted until 1800 (2 Stat. 36), and the statute contemplated acts of legal bankruptcy pursuant to state law as well as federal law.

> where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.

Prior to 1799, the federal priority was subject to essentially voluntary enforcement by persons administering the estates of insolvent or deceased debtors, as there were no sanctions for disregarding the priority, nor any federal bankruptcy laws under which a court might enforce the priority. This deficiency was cured by the Act of March 2, 1799, 1 Stat. 627, Section 65 of which provided, *inter alia,* that (1 Stat. 676):

> in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting,

> previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof * * *.[9]

The personal liability established by Section 65 has supplied a particularly important means for enforcing the priority for debts due to the United States not only during periods when there have been no federal bankruptcy laws[10] but also when an insolvent debtor's estate is administered outside of the bankruptcy laws, as in the instant case.

Federal bankruptcy laws, however, either directly or by reference to the priority statutes, have long provided some measure of priority for "debts" due to the United States.[11] Presently, "debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority * * *" are included in the fifth priority given

[9] Section 65 further provided that the "cases of insolvency" referred to included the same situations specified in the 1792 statute (see p. 10, *supra*).

[10] During the periods 1789 to 1800, 1803 to 1841, 1843 to 1867, and 1878 to 1898 there was no federal bankruptcy law in effect. See 1 Collier, *Bankruptcy* ¶¶ 0.04–0.06 (Moore & King 14th ed. 1974).

[11] See, *e.g.*, 2 Stat. 36; 5 Stat. 444; 14 Stat. 531. See also 3A Collier, *supra*, at ¶ 64.501 [2.1] (1972).

by Section 64 of the Bankruptcy Act, as amended, following costs of administration, wages of employees, taxes owing by the bankrupt to the United States or to a state, and preceding all other debts to unsecured creditors. 11 U.S.C. 104(a). See also 11 U.S.C. 502, 1059(6).

In the Revised Statutes of the United States, the general federal priority established in 1797 and the personal liability established in 1799 were codified as Section 3466 and 3467, now 31 U.S.C. 191 and 192, respectively. It is now well—established that these provisions "are part of a single statutory structure" and "must be interpreted *in pari materia*." *King* v. *United States*, 379 U.S. 329, 334, 336.

2. *The history and purpose of the federal priority statutes.*

Although the purpose and proper scope of the federal priority statutes are not illuminated by the usual sources of legislative history,[12] they are not without relevant historical background. At common law the Crown had the sovereign prerogative of having its debts paid in preference to those of other creditors. 1 Clark, *Receivers* § 699, at 948 (2d ed. 1929). Although the priority of the federal government has been held to rest solely upon the statutes, and not upon the common law prerogative (*e.g.*, *United States* v. *State Bank*, 6 Pet. 29, 35), many states determined that they had a common law priority similar to the Crown's. For example, in 1793 the Maryland General Court held the state entitled to priority at common law for a simple contract debt. *Murray* v. *Ridley*, 3 Harr. &

[12] See, *e.g.*, Annals of Cong. 1549, 1551, 1563, 1569, 1571, 1575, 1576, 2079, 2161 2162 (1849); 8 *id.* at 2216–2221 (1851); 9 *id.* at 2815 2821, 2857 (1851).

McH. 171, 175. See generally *Marshall* v. *New York*, 254 U.S. 380, 382–383; Annotation, 51 A.L.R. 1355 (1927).

While not resting on the same legal basis as the Crown's priority, the federal priority was intended to serve the same public policy of assuring that, in order "to sustain the public burdens, and discharge the public debts," the government's flow of revenues not be diminished by the insolvency of those who owe it money (*United States* v. *State Bank, supra,* 6 Pet. at 35), and the priority statutes are to be liberally constructed to that end. See *United States* v. *Key,* 397 U.S. 322, 324.

In terms of that policy, there is no basis for distinguishing between debts due to the United States that are liquidated in amount and those that have not yet been liquidated. The priority statutes are designed to insure that the government's debts are paid first out of insolvent debtors' estates, and that objective requires that all of those debts, not just those whose amount has been fixed at the time of an assignment, obtain the priority. If the government's claim is sufficiently fixed and ascertainable to entitle the government to payment from the debtor's estate—as respondents concede is so here (Reply to Pet. 8)—it is entitled to priority as well.[13] The government's need for the revenues due

[13] If Emsco had claims against the United States, its debts for breach of the contracts could have been offset against such claims pursuant to the long-standing practice, endorsed by Congress and this Court, in which the government may set-off against its obligations to a contractor the latter's debts due to the United States, including disputed liabilities for breach of contract not finally ascertained in amount. See, *e.g.*, 31

from its debtors is unrelated to the degree of certainty, at an arbitrary date often reflecting merely the choice of the debtor or of other creditors (see p. 17, *supra,* n. 15), about the precise amount ultimately owing.

Justice Story observed in *United States* v. *State Bank, supra,* with particular reference to bonds given by debtors who had died or had made assignments for the benefit of creditors (6 Pet. at 38):

> No reason can be perceived, why, in cases of a deficiency of assets of deceased persons, the legislature should make a distinction between bonds which should be payable at the time of their decease, and bonds which should become payable afterwards. The same public policy, which would secure a priority of payment to the United States, in one case, applies with equal force to the other; and an omission to provide for such priority in regard to bonds, payable *in futuro,* would amount to an abandonment of all claims, except for a *pro rata* dividend. In cases of general assignments by debtors, there would be a still stronger reason against making a distinction between bonds then payable and bonds payable *in futuro;* for the debtor might, at his option, give any preferences to other creditors, and postpone the debts of the United States, of the latter description, and even exclude them altogether. In the case before the court, the assignment expressly postpones the claims of the United States in favor

U.S.C. 227; *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239–240; 4 Ops. Att'y Gen. 380 (1845).

> of mere private creditors. It would be difficult to assign any sufficient motive for the legislature to allow the public debtors to avail themselves of such an injurious option. * * * [14]

B. THE PRINCIPLE THE COURT OF APPEALS ANNOUNCED PERMITS A DEBTOR TO CIRCUMVENT THE FEDERAL PRIORITY AND GIVE PREFERENTIAL TREATMENT TO PRIVATE CREDITORS

As we have noted (see pp. 12–13, *supra*) the Bankruptcy Act accords priority to debts owing to the United States that are entitled to priority under federal law. 11 U.S.C. 104(a)(5). If bankruptcy proceedings against Emsco had been instituted, the claims in issue here would not only have been provable debts but would have been entitled to priority (see pp. 26–27, *infra*). The decision whether such proceedings should be instituted, however, is effectively in the hands of the debtor, who may at any time file a petition to be

[14] A distinction among debts entitled to priority is not necessary to facilitate the administration of the debtor's estate, because the person responsible can simply set aside sufficient assets to cover the government's claims. Cf. *United States* v. *Barnes*, 31 F. 705, 709 (C.C. S.D. N.Y.). Nor is such a distinction justified by concern about delay in administering the estate. Under the Bankruptcy Act, as noted below (p. 26, *infra*), a contingent claim is not provable if to do so would unduly delay the proceedings. With respect to defense contracts, moreover, contracting officers are obliged to ascertain "promptly" the amount of all indebtedness to the government. 32 C.F.R. 163.101(b). Where the supplies or services covered by a defaulted contract are still required after termination of the contract, "repurchase * * * shall be made against the contractor's account as soon as practicable after termination." 32 C.F.R. 8.602–6(a). There is no basis for claiming here—and the court of appeals did not hold—that the government did not "diligently liquidate its claims" (Reply to Pet. 8).

adjudged a voluntary bankrupt (11 U.S.C. 95(a)), or of creditors other than the United States, because the United States cannot itself institute bankruptcy proceedings.[15]

Under the decision of the court of appeals, however, the government's claim was denied priority simply because Emsco and its creditors chose to forego bankruptcy proceedings in favor of an assignment for the benefit of creditors made after Emsco became liable to the United States for breach of contract but before the United States had had an opportunity to fix the amount of that liability by repurchasing the supplies in question. The decision thus offers a means for, and incentive to, the government's contract debtors and their private creditors to avoid the effect of the federal priority statute, which often reduces the amount that unsecured creditors recover from insolvent debtors.[16] A debtor might well be inclined to take that course to curry favor with its creditors, with whom it may wish to deal further.

[15] If twelve or more creditors have claims, an involuntary bankruptcy petition may be filed only by three or more creditors having provable liquidated claims, not contingent as to liability, amounting in the aggregate to $500 in excess of the value of any securities held by them. 11 U.S.C. 95(b).

[16] In the instant case, for example, if the government's claims have priority the other creditors will take nothing, whereas if there is no priority they will receive substantial portions of their debts and the United States will receive nothing (see pp. 4–5, *supra*). We note in this connection that, in view of the higher prices when the contracts were relet, it is not accurate to say that "the United States is not actually out any money because of" Emsco's default (Reply to Pet. 7).

The effect of the decision, moreover, is not necessarily confined to the situation presented in the instant case where the United States was entitled to "cover" the contractor's default by repurchasing. A contractor's indebtedness to the government can arise in various ways,[17] many of which claims would not be liquidated or certain in amount until some time had passed or further action had been taken. Such an undermining of the scope of the federal priority statutes is contrary to the long-established principles concerning their public purpose and broad scope.

[17] Defense Department regulations concerning "contract debts" provide the following "examples" of ways in which "[i]ndebtedness to the Government" arises (32 C.F.R. 163.99):

"(a) Damages or excess costs incident to defaults in performance;

(b) Breach of contract obligations concerning progress payments, advance payments, or Government-furnished property or material;

(c) Delinquency in rentals;

(d) Delinquency in payment of price of property purchased from the Government;

(e) Expense of correction of defects;

(f) Overpayments incident to errors in quantity, deficiencies in quality, or errors in billing;

(g) Retroactive price reductions resulting from contract provisions for price redetermination or for determination of prices under incentive type contracts;

(h) Delinquency in payment of charges for Government services;

(i) Delinquency in payment called for by agreement or arrangement for deferral or postponement of payments;

(j) Statutory renegotiation. * * *"

C. THIS COURT HAS CONSTRUED THE PRIORITY STATUTES AS NOT BEING LIMITED TO CLAIMS ENFORCEABLE IN A COMMON LAW ACTION FOR DEBT OR TO CLAIMS THAT HAVE FULLY MATURED OR ARE LIQUIDATED

The purpose of the federal priority statutes, this Court has held, "is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning." *Price* v. *United States, supra,* 269 U.S. at 500; accord, *Bramwell* v. *United States Fid. & Guar. Co.,* 269 U.S. 483, 492. In holding that the term "debt" as used in another statute was not "restricted to demands enforceable in actions of debt," and covered unliquidated damages for breach of contract, this Court noted the broad meaning given to the term in English law and a variety of federal and state statutes. *Miller* v. *Robertson,* 266 U.S. 243, 249–250. Here, as in *Miller,* "[i]t would be unreasonable and contrary to the intention of Congress" to limit the term "debt" to "causes of action cognizable in debt under technical procedural rules." *Id.* at 250.

Rather, this Court has stated that the priority statutes apply to "[a]ll debtors to the United States, whatever their character, and by whatever mode bound * * *." *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 134. As Chief Justice Marshall stated in 1805, in upholding their constitutionality, taken in its "natural and usual sense" their language comprehends "every debtor of the public, however his debt might have been

contracted." *United States* v. *Fisher,* 2 Cranch 358, 385.[18]

Moreover, an interpretation of the priority statute under which only debts that could be recovered in a common law action for debt are entitled to priority would provide unsatisfactory guidance to persons administering the estates of debtors. If they erred in applying the hoary principles of pleading thus implicated,[19] they would risk personal liability for payments made on claims of other than the asserted debt of the United States. 31 U.S.C. 192. Alternatively, expensive and time-consuming litigation might be required before payments were made to any creditors, as in this case.

The Court has also held that the priority statutes are not limited to debts that have "matured" or are "liquidated" at the time the priority arises (*e.g.,* when the debtor dies, makes a voluntary assignment for the benefit of creditors, or commits an act of bankruptcy). For example, in *United States* v. *Bryan,* 9 Cranch 374, 386, the Court held that a deceased customs collector had been in debt to the United States at the time of his death, even though his account was not settled nor the amount of the indebtedness established until four years later. Similarly, in *United States* v. *State Bank, supra,* the Court explained, in a leading opinion by Justice Story, that the priority statutes apply not only to debts payable to the United States at the time of a person's insolvency or death, but also to debts "payable only *in futuro* * * *." *Id.* at 35–36. Noting the reference in the 1797 statute to the insufficiency of a decedent's estate "to pay all debts due from the deceased," the Court observed that in the settlement of estates of deceased persons "no distinction is ever taken between debts which are payable before or after their decease; the assets are equally bound for the payment of all debts." *Id.* at 36–37. The Court saw no basis for giving "debts due" a different meaning in regard to the debts of the United States. *Ibid.*[20] In other words, the Court construed "debts" as including any type of debt for which a debtor's estate might be held liable.

[18] In *Fisher* the Court held the federal priority applicable to the liability of an endorser of an unpaid foreign bill of exchange held by the United States without regard to whether the claim of the United States was cognizable in an action of debt. See generally Kyd, *Bills of Exchange* 175–202 (3d ed. 1795). In *Price* v. *United States, supra,* 269 U.S. at 500, where the Court held that taxes were "debts due" under the priority statutes, the Court mentioned that "an action of debt lies to recover taxes where the amount due is certain or readily may be made certain," but the context makes it clear that the Court did not mean to indicate that the statutes were limited to debts recoverable in an action for debt.

[19] We advert to, but need not address here, the additional complications that might arise concerning choice of the governing law.

[20] A century ago the Court characterized the priority statutes as follows (*Lewis* v. *United States,* 92 U.S. 618, 621):

"Those affected are persons 'indebted to the United States.'

"This language is general, and it is without qualification.

"The form of the indebtedness is immaterial.

"It may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute."

The Court added that its construction of the statutes as covering debts payable in the future was the same as that "practically acted upon by the government, as well as individuals, ever since its enactment" and that many estates of decedents and of insolvents "have been settled upon the footing of its correctness." *Id.* at 39.[21]

So well-established are these interpretations of the federal priority statutes—embodying principles antithetical to those applied by the court of appeals in this case—that in the past 150 years this Court and others have repeatedly applied those statutes, often without question in this respect, to debts due to the United States that were no more certain in amount at the critical date than those involved here. See, *e.g., King* v. *United States,* 379 U.S. 329, affirming 322 F. 2d 317, 321 (C.A. 3) (liability for excess costs to government due to termination of government contract for default); *United States* v. *Butterworth-Judson Corp.,* 269 U.S. 504 (claim in litigation for overpaid advances on terminated construction contract); *United States* v. *National Sur. Co.,* 254 U.S. 73 (same); *Employers' Liab. Assur. Corp.* v. *Astoria Mahogany Co.,* 6 F. 2d 945, 947 (C.A. 2) (liability on terminated war contract, amount not ascertainable till three years later); *Davis* v. *Michigan Trust Co.,* 2 F. 2d 194 (C.A. 6), affirmed *sub nom. Mellon* v. *Michigan Trust Co.,* 271 U.S. 236 (liability for transportation services rendered and conversion of a shipment of iron); *United States* v. *Flint Lumber Co.,* 87 Ark. 80, 112 S.W. 217 (liability for value of homestead land trees unlawfully cut).

[21] The debt in *State Bank* arose under a customs bond, which the Court held, alternatively, constituted at common law *debitum in praesenti, solvendum in futuro, i.e.,* an existing obligation payable at a future date (6 Pet. at 38), but the Court did not limit its discussion of debts payable in the future to such debts.

In *United States* v. *Barnes,* 31 F. 705 (C.C. S.D. U.Y.), the court held the federal priority statutes applicable to a claim by the United States based a pre-bankruptcy violation of the customs laws,[22] which was not reduced to judgment (for an amount far less than that claimed) until more than a year after the adjudication of bankruptcy and after the assignee in bankruptcy had distributed the assets to the other creditors. The assignee, who was aware of the government's uncertain claim when he made the distribution, was held personally liable for the amount distributed even though the government did not file a proof of claim until long thereafter. See also *United States* v. *Brunner,* 282 F. 2d 535 (C.A. 10), discussed at pp. 26–27, *infra.*

In sum, under the settled construction of 31 U.S.C. 191 and 192, the United States is entitled to priority for its debts even if at the time of the bankruptcy, assignment, death, etc., they are unliquidated or uncertain in amount,[23] or if they are in some sense contin-

[22] The government sought forfeiture of the value of goods fraudulently imported. See *In re Vetterlein,* 44 F. 57, 58 (S.D. N.Y.).

[23] No authority exists for Judge Coleman's suggestion in his concurrence that the government's "'claim' [did not] ripen into a 'debt due' * * * until the amount of the damages * * * had been ascertained by someone with the appropriate jurisdiction

gent.[24] Indeed, respondents concede that the court of appeals erred in requiring "that the obligation be presently payable at the time of insolvency" (Reply to Pet. 6).

to make a determination binding on both the claimant and the defendant" (Pet. App. A 19), a rule that not only would be contrary to established practice and precedent, but might foster unnecessary litigation.

[24] This Court's 5-to-4 decision in *Massachusetts* v. *United States*, 333 U.S. 611, is not to the contrary. There the Court held that once the federal priority attached (based there on the debtor's liability for federal unemployment compensation taxes) it could not be divested by the debtor's election, pursuant to the Social Security Act, to pay comparable state taxes and take a credit for up to 90 percent of the federal tax liability. In a dictum relied upon by Judge Coleman in his concurrence in this case (Pet. App. A 19), the Court observed that (333 U.S. at 626–627; footnotes omitted):

"if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the 'debt' itself becomes contingent. And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time of insolvency.

"However this may be, we know of no previous application of § 3466 creating such a conditional priority. Nor do we see how one could be made consistently with the section's terms or purposes. The only such consistent application would seem to be one giving the Government the prior and indefeasible right to take the fund available, up to the amount necessary to pay its claim as of the date the priority attaches, not as it may be affected by later contingencies other than payment. In enacting § 3466 Congress gave no indication whatever of intent to create defeasible priorities."

The claim in *Massachusetts* of a "contingent" debt or "conditional priority" that was "defeasible" *at the debtor's option* is a very different matter from a defaulting contractor's indefeasible obligation to pay damages where the amount of that liability might depend upon actions taken *by the United States*.

D. LIABILITIES UNCERTAIN IN AMOUNT OR PARTLY CONTINGENT ARE GENERALLY TREATED AS "DEBTS" IN BANKRUPTCY AND OTHER PROCEEDINGS INVOLVING DEBTORS

The narrow, hypertechnical construction given the term "debts" by the court of appeals is contrary to the settled practice under federal and state law in handling "debts" owed by insolvents or deceased persons—areas of law made relevant by the priority statutes themselves and this Court's opinions construing them (see p. 21, *supra*).[25]

[25] Claims antedating a debtor's death that do not become absolute until thereafter, or are uncertain in amount, are generally enforcible against a decedent's estate (*e.g.*, Woerner, *American Law of Administration* § 394, at 1275–1276, 1278–1279 (3d ed. 1923); Tomlinson, *Administration of Decedents' Estates* § 19.4–5*d* (1972)), and the estate succeeds to contractual liabilities even if "the time for performance has not arrived, and the damages are uncertain." *Jones* v. *Cooper*, 2 Aikens 54, 57, 16 Am. Dec. 678, 681 (Sup. Ct. Vt.). The same rule applies in receivership proceedings. *E.g.*, *City of Bridgeport* v. *Aetna Indem. Co.*, 91 Conn. 197, 99 A. 566, 568–569 (Sup. Ct. Err.); II Tardy, *Smith on Receivers* § 594, at 1660–1661 (2d ed. 1920); 1 Clark, *Receivers* § 684, at 992–993 (2d ed. 1929). Similarly, with respect to general assignments for the benefit of creditors, the assignee may pay "[l]iabilities actually existing, although contingent in their character and not yet matured * * *." Bishop, *Insolvent Debtors* § 213 (3d ed. 1895). The assigned estate is liable for "damages resulting from the breach of a contract occurring prior to the assignment." *In re Chestnut St. Trust & Sav. Fund Co.'s* Assigned Estate, 217 Pa. 151, 154, 66 A. 332, 333. Claims for breach of contract, uncertain in amount, have also been held to be "debts" due under state insolvency statutes, operative when not preempted by federal bankruptcy laws. *E.g.*, *Lothrop* v. *Reed*, 95 Mass. (13 Allen) 294.

In the reverse situation, *i.e.*, a default by the United States under a contract to supply goods, the consequent debt of the United States, despite uncertainty about the amount, would normally be includable among the assets and property

Under the Bankruptcy Act, for example, a creditor is entitled to prove "debts" founded upon, *inter alia,* "contingent debts," "contingent contractual liabilities," and "claims for anticipatory breach of contracts, executory in whole or in part." 11 U.S.C. 103(a)(8), (9). See also 11 U.S.C. 506(1), (6), 707(2), 806(2), (7), 1006(1), (4).

A "contingent" or "unliquidated" proved claim may be allowed, moreover, so long as it is liquidated or estimated within a period specified by the bankruptcy court and "such liquidation or estimation would [not] unduly delay the administration of the estate * * *." 11 U.S.C. 93(d). Accordingly, a debt arising out of the bankruptcy's breach of contract may be proved and allowed, and is subject to discharge, even if the damages had not fully accrued or been fixed in amount when the bankruptcy petition was filed. *E.g., Central Trust Co.* v. *Chicago Auditorium Ass'n,* 240 U.S. 581, 591–593; *Maynard* v. *Elliott,* 283 U.S. 273, 278; *Brown* v. *O'Keefe,* 300 U.S. 598, 605–606.

That Emsco's liabilities under the three defaulted contracts would have been provable and entitled to priority in a bankruptcy proceeding is demonstrated by *United States* v. *Brunner,* 282 F. 2d 535 (C.A. 10). After failing to deliver the first installment of goods it had contracted to supply the United States, the

of the other party in bankruptcy proceedings (*e.g.*, 11 U.S.C. 110(a)(6)), receivership proceedings (*e.g.*, I Tardy, *supra*, at § 281), a general assignment for the benefit of creditors (*e.g.*, Burrill, *supra*, at 70–72, 354–355), and, in the case of an individual, the administration of his estate (*e.g.*, Woerner, *supra*, at § 306).

company filed a voluntary bankruptcy petition. Shortly thereafter the government declared the contract terminated for default and, as here, repurchased the goods elsewhere at a higher price. Reversing the referee's disallowance of the claim, the court held that when the petition was filed the United States had a provable debt for its damages which was entitled to priority. *Id.* at 539.[26]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[26] It was irrelevant in *Brunner* that the government's formal termination of the contract followed the filing of the petition, because the filing of the voluntary petition itself, which disabled the contractor from performing, constituted an anticipatory repudiation of the contract giving rise to a right of action for damages by the United States. *Id.* at 538, n. 3. See also *Central Trust Co.* v. *Chicago Auditorium Ass'n*, *supra*, 240 U.S. at 589–592. A general assignment for the benefit of creditors has the same effect, as it ordinarily "put[s] an end to the transaction of * * * business" by the debtor. Burrill, *supra*, at 490.

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